

PUBLIC LAW BOARD NO. 7585

Case No. /Award No. 67
Carrier File No.: 10-16-0263
Organization File No.: C-16-D070-10
NMB 119
Claimant: B.K. Fresquez

BNSF RAILWAY COMPANY

-and-

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES DIVISION - IBT

FACTS:

On May 5, 2016 Claimant Fresquez was allegedly instructed to stringline a defect. Roadmaster Michael W. Paz asserted Claimant failed to comply with the instruction. As a result, Claimant was found guilty of violating MOWOR 1.6, Conduct and MOWOR 1.13 Reporting and Complying with Instructions and was he was dismissed. The Organization protested the dismissal as unfair and unwarranted. The claim has been duly processed to consideration by this Board of Adjustment.

CARRIER POSITION:

According to the Carrier, Claimant was repeatedly told to stringline a defect and failed to do so, with the final instruction being by radio transmission. The recording of this transmission was played at the investigation hearing but was one-sided with Paz's statements being inaudible. The recording was transcribed at hearing as follows in pertinent part:

BRANDON K FRESQUEZ: Nah, you guys already made your decision. You got a Foreman there, and you guys have made your decision, so. No, you guys already made your decision, uh, I don't see the, the point of stringlining something when you've already made your decision with the Foreman. My final opinion is it's, uh, kind of pointless to stringline something if you've already made your decision. I didn't say no. TR 11

Paz testified unequivocally that Claimant refused to follow his instructions:

NED PERCIVAL: Mr. Paz, did Mr. Fresquez at any time comply with your instructions and stringline the location you identified?

MICHAEL W PAZ: No, he did not.

NED PERCIVAL: Just for my understanding, was Mr. Fresquez specifically instructed to stringline thi- this location?

MICHAEL W PAZ: Yes, I instructed him three times. All three times he disagreed, got in his vehicle, and drove away from our work location.

NED PERCIVAL: Mr. Paz, could there have been any misunderstanding between you and Mr. Fresquez about your instructions?

MICHAEL W PAZ: Absolutely not. TR 6-7

As to the radio conversation, Paz testified: "I had a radio conversation for a fourth time with Mr. Fresquez, instructing him to stringline the location that was noted. He stated no, there's no point, you've done made up your mind." TR 7 Paz claimed he did the stringline himself and Claimant watched, became argumentative then left.

The Carrier acknowledges that at one point Claimant was called away to other duties. In its view, this did not alter his insubordination because it came after Claimant's refusal. The Carrier also notes that if the Organization wanted another witness to testify, it should have requested his attendance; it did not.

ORGANIZATION POSITION:

Claimant insists Paz did not instruct him to stringline. "Again, he didn't instruct me to stringline the defect. At the time of me walking away, I felt that I was being bullied." TR 19 Claimant admitted he did not ask for clarification from Paz. Rather, Claimant testified that Paz had already decided to remove the defect without stringlining it. Since Paz had already made up his mind that there was no defect, Claimant asserts he reasonably concluded there was no point in stringlining it. He denied being argumentative, and said he received a call to remove an obstruction at Kalamath, so he departed to perform that task. The Organization maintains this is the more credible accounting of what happened.

The Organization notes that hand held radios can be heard as far away as Fort Worth, Texas. In its view, the only rational explanation for the one-sided nature of the recording is that it was altered. The Organization concludes that Paz's excuse – that his hand held radio may not have transmitted with enough strength – is lacking in credibility.

The Organization maintains there is a serious discrepancy between the written transcript and the oral conversation as heard in the audio communication played at hearing in that the transcribed words "Nah" and "no" were never said said. The transcription is wrong:

Claimant did not say these words, the Organization argues, he was merely indicating that Paz had already made up his mind and was acting in a retaliatory manner.

The Organization also notes that Foreman Herzog was at the scene and could have confirmed the nature of the exchange between Claimant and Paz. However, the Carrier failed to call him, resulting in a lapse of important evidence and denial of a fair hearing. The Organization points out that earlier in the day Claimant argued with Paz and refused to follow his instruction to falsify FRA reports. In his view, Paz retaliated against him for this by setting him up for a charge of insubordination.

DECISION:

The Board does not find Herzog's testimony to be crucial because the evidence of record is both adequate and substantiated. No procedural violation is found.

The burden of proof in this matter is substantial evidence. The pivotal issue here involves credibility. Because of the many aspects of technology in radio communications, the Board declines to read falsification or manipulation into the fact that Paz's part of the radio communication was inaudible.

Despite his denial of being instructed to stringline, the nature of Claimant's testimony is consistent with and supportive of the conclusion that he was protesting just such an instruction:

- "I did not see the point in stringlining it if he's already made up his mind." TR 18.
- "I was called off on a safety issue. Uh, when I returned back to south Denver after I got called off on a safety issue, I, uh, tried to help, and I was told, uh, uh, basically I was told that they didn't want to talk to me at that time." TR 17
- "Again, he didn't instruct me to stringline the defect. At the time of me walking away, I felt that I was being bullied." TR 19.

Claimant's statement that he did not see the point in stringlining is exactly what Paz described as noncompliance. He was arguing, and the statement that he did not see the point was plainly belligerent. The assertion that when Claimant returned, Paz and his co-worker did not want to talk to him is consistent with and affirmational of a disagreement between Claimant and Paz, as is Claimant's contention that he was being bullied. Claimant's own testimony substantiates the Carrier's allegation that he was argumentative and refused to stringline.

Claimant's own testimony undermines his denial of an instruction to stringline. The denial is simply not credible given the context of Claimant's exchange with Paz. Claimant's own

version of the exchange with Paz is rife with tension, frustration and disagreement. Further, the transcription of the radio exchange supports Paz' version of the facts.

The Board finds it unlikely that Claimant would protest that there was no point in doing something unless he had been told to do it. Claimant's assertion that Paz acted in retaliation for Claimant's prior refusal to falsify a document cannot be credited. There is no substantiation and Paz denied any such argument. The evidence submitted in this case has persuaded this Board that Claimant argued with Paz, refusing to stringline and insisting there was no point in doing so. The Carrier has met its burden of proof.

AWARD:

The claim is denied.

January 18, 2018; Park City, Utah



Patricia T. Bittel, Neutral Member



Zachary Voegel, Organization Member



James Rhodes, BNSF Member